FILE COPY

IN THE

Supreme Court of the United States

October Term 1948

No. 160

IN THE MATTER

of

SAMUEL ROSE,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Samuel Rose, hereby petitions for a writ of certiorari to review a decision of the Appellate Division, First Department of the Supreme Court of the State of New York, dated January 24, 1947 and filed March 4, 1947, which denied petitioner's application to vacate an order made by that court striking his name from the roll of attorneys admitted to practice before the courts of the State of New York.

STATEMENT OF MATTER INVOLVED

Petitioner was admitted to the Bar of the State of New York in October, 1918. In 1929, purely as a result of a mental and physical collapse resulting from a series of misfortunes—having nothing to do with his professional conduct, and having their inception in a period of time extending over several years prior to 1929—petitioner signed documents resigning from the Bar of the United States District Court for the Southern District of New York and from the Bar of the State of New York, and consenting to an order striking his name from the roll of attorneys of the State of New York.

The resignation and consent executed by the petitioner (fols. 67-72) made no reference to any charge or claim of misconduct on the part of the petitioner. Indeed, no claim or charge of misconduct or any admission thereof has ever existed in this case. Without any hearing or further proceeding, the Appellate Division on December 2nd, 1929, entered an order of disbarment against petitioner (fols. 61-66). This order recites that it is based on "the annexed consent and affidavit" and these are the only documents recited as the basis of said order. The order is silent of any averment, any finding, or admission of guilt of any charge. (As will be pointed out herein, the applicable statutes of the State of New York require a determination of guilt and the granting of a hearing before such a determination can be had or disbarment ordered.)

In 1932, after petitioner had recovered his normal health and mentality, and upon his request, the facts and circumstances concerning his resignation were thoroughly exam-

ined into at the direction of Hon. John C. Knox, senior judge of the United States District Court for the Southern District of New York. (The reason petitioner made this request first in the Federal Court and not the State Court, was that his practice in the main had been before the Federal Court.) Judge Knox appointed Harold Harper, Esq., of the New York Bar, as Special Master and many hearings were held before him at which the United States Attorney for the Southern District of New York as well as the Association of the Bar of the City of New York were represented and in which they actively participated.

At the conclusion of the proceeding before Special Master Harper and upon his report exonerating petitioner, Judge Knox confirmed that report and found that petitioner's resignation was "not the result of any professional misconduct or consciousness thereof on his part" but of "other unavoidable facts and circumstances, including a condition of grave physical ill health and nervous collapse by reason of which petitioner was not then able to exercise any sound, normal judgment in respect of resignation or the significance thereof" (fols. 78, 79). Judge Knox thereupon ordered that the petitioner be reinstated to the Bar of the United States Court for the Southern District of New York on presentation of a certificate of admission to the Bar of the State of New York—the latter condition being imposed because the rules of the United States Court of the Southern District of New York required that a member of its Bar be in good standing at the Bar of the State of New York.

No objections were made, or any exceptions taken, to the report of the Special Master, or the findings of Judge

Knox by either the United States Attorney for the Southern District of New York or by the Association of the Bar of the City of New York.

Prior Proceedings

Because of the findings of Judge Knox that reinstatement be had, petitioner, in 1933, applied to the Court which disbarred him, asking that Court to invoke its *discretion* and to *reinstate* him to practice, urging that his past professional conduct did not warrant disbarment. This application was now strenuously opposed by the Association of the Bar of the City of New York. The Appellate Division, without rendering any opinion, denied that application (242 App. Div. 819). The Court of Appeals of the State of New York granted petitioner leave to be heard by that Court, but later, and also without opinion, affirmed the lower court's determination (268 N. Y. 523).

In 1944, petitioner applied to the Association of the Bar of the City of New York for reconsideration of its attitude and its opposition to his reinstatement. After a thorough investigation, the Association, through its Executive Committee, adopted the following resolution on May 2, 1945 (fols. 88-92):

> "Resolved, that no opposition be interposed by the Association of the Bar of the City of New York to the application of Samuel Rose for reinstatement to the Bar."

Armed with this approval petitioner, in 1945, once again addressed himself to the court's *discretion* and applied to

the said Appellate Division for *reinstatement* to the Bar. This application was denied without opinion (270 App. Div. 921) as was permission to appeal to the Court of Appeals.

It should be noted that each of these two foregoing applications were addressed to the court's discretion and sought reinstatement upon the ground that petitioner's past and present conduct and the circumstances of his resignation warranted such action.

The Proceedings to Vacate the Order of Disbarment, the Decision in Which is Sought to be Reviewed by this Court

Thus this petitioner, on the basis of a judicial determination of his innocence by the Federal Court, had endeavored for many years to achieve his restoration to the Bar by proceedings addressed to the discretion of the state courts.

In all of these prior proceedings and in the appeals to the Court of Appeals neither of the courts at any time expressed any reason for their determinations, all of their decisions being without opinion. After the denial of the last proceeding for reinstatement, petitioner became fully convinced that the Appellate Division would not, by any further effort on his part, be moved to invoke its discretionary power in his favor.

Thereupon, in 1946 petitioner initiated a new and entirely different proceeding, challenging the validity of the disbarment order *ab initio*.

This application was not directed to the court's discretion nor did it seek reinstatement to the Bar.

This application, *for the first time,* sought an order from said Appellate Division to *vacate* and *set aside* the order of disbarment made by that court upon the sole ground that the making and entry of said order was not in compliance with the provisions of Sections 88 and 476 of the Judiciary Law of New York as they read in 1929, the time of the making of the order (the provisions of which sections are set forth in the appendix) and therefore violative of petitioner's constitutional rights and in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States of America (fol. 60).

Petitioner's contentions, which are more fully set forth in the accompanying brief, were and are that the Appellate Division could not legally have made the order of disbarment against him upon the documents and papers presented to that court at the time of the making of that order.

The authority of the Appellate Division to remove an attorney from the Bar of the State of New York is purely statutory. It is not the outgrowth of the common law nor is it part of any inherent power possessed by it as a court. The power of removal must be conferred by statute. (*Matter of Percy,* 36 N. Y. 650; *Matter of an Attorney,* 83 N. Y. 164; *Matter of Robinson,* 209 N. Y. 356.)

Statutes dealing with the removal of attorneys are penal in nature and therefore require strict construction and strict compliance. (*Prussian* v. *U. S.,* 282 U. S. 675; *Speeter* v. *U. S.,* 42 Fed. (2) 937.)

In 1929, the statutes dealing with this subject matter were Sections 88 and 476 of the Judiciary Law of New York (now Section 90).

Section 88, subdivision 2, after reciting that the Appellate Division shall be authorized to suspend, censure or remove an attorney, provides that such authority may be exercised *only* where the attorney:

> "is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor or any conduct prejudicial to the administration of justice."

Obviously, an order of disbarment can be made only upon a finding or admission that the attorney is "guilty" of one of the acts of misconduct enumerated in this statute.

But the record here discloses total lack of any proof of guilt, or of facts indicating that any charges of misconduct had ever been made against petitioner or that he ever admitted or confessed to any acts of misconduct.

The legislature was careful to safeguard an attorney from removal upon any basis or grounds other than those set forth in Section 88, Subdivision 2, of the Judiciary Law of the State of New York, and to assure protection to attorneys enacted Section 476 of said Judiciary Law which provided:

> "Before an attorney or counsellor at law is suspended or removed as prescribed in Section 88 of this Chapter, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the presiding justice of the Appellate Division of the Supreme Court to which the charges have been presented, that he cannot be

served within the State, the same may be served upon him without the State by mail, or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense * * *".

The law is and always has been that unless an attorney commits an act specifically enumerated in Section 88, he may not be disbarred or removed from practice (*Matter of Spencer,* 137 App. Div. 330, aff'd 20 N. Y. 613; *Matter of Redmond,* 267 App. Div. 780); and that he must first be given notice of the charges and a hearing thereon (*Matter of Spencer, supra; Matter of Sidman,* 268 App. Div. 1040).

It is elementary that where the Legislature has delegated to a court the power to enter a judgment upon certain specified facts and grounds, the court may not exercise such power upon grounds other than those enumerated in the statute (*Davidson* v. *Ream,* 178 App. Div. 362). Applying this cardinal rule of law to the instant case we find that the order of disbarment was entered upon a ground not specified in the then Section 88 of the Judiciary Law of New York. That statute did not grant to the Court the authority to make an order of disbarment upon a resignation alone, unaccompanied by a finding, admission or confession of guilt of misconduct.

The result of the wrongful and improper entry of the order of disbarment has been to deprive petitioner of his property rights without due process of law, for there no longer is any question but that where a person has been duly licensed to practice a profession he acquires a right and "estate" to continue in the prosecution of that pro-

fession and that it can be taken away only by due process of law. (*Dent* v. *West Virginia,* 129 U. S. 114; *Ex parte A. H. Garland,* 18 U. S. L. Ed. 366; *In re Applications for Admission to Practice,* 14 S. D. 429, 85 N. W. Rep. 992.)

In September 1946 petitioner's motion to vacate the order of disbarment was denied by said Appellate Division.

Proceedings Subsequent to said Determination by the Appellate Division

After this last determination by the said Appellate Division, petitioner, believing and having been advised that Section 588, subdivision 1a of the New York Civil Practice Act permitted him to appeal from that decision as a matter of right to the Court of Appeals of the State of New York, filed with that Court his papers on appeal and supporting briefs. Oral argument was then had before the Court of Appeals and thereafter that court dismissed the appeal upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the State Constitution (297 N. Y. 786).

Subsequently, and pursuant to the provisions of Section 589, subdivisions 1a, 2a, 3a and 3b, and Section 592, subdivisions 2, 3 and 5b, of the New York Civil Practice Act (the provisions of which are set forth in the appendix), petitioner applied to the said Appellate Division for an order granting him leave to appeal to the Court of Appeals. This application was denied by an order dated March 1, 1948.

Aware of the prerequisite that a decision by the highest court of the State is necessary before applying to this

court for a writ of certiorari, petitioner applied in the State Court of Appeals for permission to appeal and to be heard by that Court. That application was dismissed (not denied) by the Court of Appeals upon the ground that the order does not finally determine the proceeding within the meaning of the constitution. Therefore the last order of the Appellate Division of March 1, 1948 is the decree of the highest court of the State "in which a decision in the suit could be had". Thereafter, and on May 12, 1948, Mr. Justice Jackson, of this Court, extended petitioner's time within which to apply for a writ of certiorari to July 20, 1948.

THE QUESTION PRESENTED

Does the making of the order of disbarment herein by said Appellate Division, based only upon the bare resignation and consent of petitioner, not coupled with any finding of guilt or an admission or confession of guilt, and without the filing or serving of charges against him, and without affording him an opportunity to be heard in his defense, exceed the power granted to said Appellate Division by the Legislature of New York, and, therefore, in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that petitioner has been deprived of the right to continue the practice of law without due process of law?

JURISDICTION OF THIS COURT TO GRANT CERTIORARI

The petition for certiorari is made pursuant to Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

The Appellate Division, First Department of the Supreme Court of the State of New York, "the highest court of the State in which a decision in the suit could be had", has finally determined the issue in the instant case and all attempts to appeal therefrom have been either denied or dismissed. (See pp. 9, 10 herein.)

The constitutional question presented was originally raised and drawn in question in the original application of September 27, 1946 to the said Appellate Division, the court of original jurisdiction (fols. 49-51), and properly preserved throughout. The decision of said Appellate Division rests solely upon Federal Constitutional grounds, and on no other.

This petition properly requests that the writ be directed to the Appellate Division, First Department of the Supreme Court of the State of New York.

This application is made within the time allowed. By order of this court, dated May 12, 1948, signed by Mr. Justice Jackson, the time for petitioner to apply for a writ of certiorari was extended to July 20, 1948. This extension, however, is conditioned upon the provision "that the statutory time has not already expired". The requested writ herein seeks to review and is directed to the resettled order of the Appellate Division, First Department of the Supreme Court of the State of New York, dated January 24,

1947, which denied petitioner's application to vacate the order of disbarment entered against him. After this denial, petitioner, pursuant to the provisions of Section 588, subdivision 1a of the New York Civil Practice Act, and being of the opinion that he was entitled to appeal to the Court of Appeals as a matter of right, served and filed his notice of appeal to the New York Court of Appeals. The papers on file and the supporting and opposing briefs were there filed and thereafter oral argument was had in that court. By order dated January 16, 1948, said Court of Appeals dismissed the appeal upon the ground that the order of the Appellate Division does not finally determine the proceeding within the meaning of the State Constitution.

Neither the dismissal of the appeal nor the subsequent dismissal of the motion for leave to appeal is a ruling that no constitutional question was presented.

Petitioner, cognizant that upon him was the burden to pursue all avenues to obtain a decision from the highest court of the State, then applied to the Appellate Division, First Department, pursuant to Section 589, Subdivisions 1a, 2a, 3a and 3b and Section 592, Subdivisions 2, 3 and 5b of the New York Civil Practice Act, for permission to appeal to the Court of Appeals. Such permission was denied by said Appellate Division by an order dated March 1, 1948. In further pursuance of said burden, petitioner then applied to the Court of Appeals for leave to appeal to that court. By order dated April 22, 1948 that application was dismissed, not denied, by the Court of Appeals.

These various appellate proceedings were all taken within the period prescribed therefor by the provisions of the New York Civil Practice Act. No further proceeding remains to be taken under the laws of the State of New York for the purpose of reviewing the decision of the Appellate Division denying his motion to vacate the disbarment order. Petitioner has fully exhausted all remedies open to him for that purpose in the courts of the State of New York.

At the time that this Court entered the order of May 12, 1948, the statutory time of three months within which petitioner could apply for a writ of certiorari had not expired and it follows therefore that pursuant to the order of this Court of May 12, 1948, petitioner has until July 20, 1948 to apply for a writ of certiorari.

THE REASONS FOR THE ALLOWANCE OF THE WRIT

This Court has never been called on hitherto to pass upon or to determine the question here presented. As already pointed out, the question is substantial, novel and of importance.

The State Courts have written no opinions and there is no direct statement by those Courts as to the reasoning or basis for their conclusions.

We believe that perhaps the decisions of the State Courts were influenced by a fear that were this application granted it would open the door to numerous similar applications. If justice and the law requires the granting of the relief sought here it should not be denied because others too might possibly benefit.

For all these reasons we believe this matter to be substantial, novel and of sufficient importance to require it to be heard by this Court.

PRAYER

For the foregoing reasons your petitioner prays that a writ of certiorari issue out of this Court to the Appellate Division, First Department, of the Supreme Court of the State of New York, commanding that Court to certify and send to this Court, on a date to be determined, a full and complete transcript of the record of all the proceedings of such Court had in this case, to the end that this cause may be reviewed and determined by this court; that the order of the Appellate Division be reversed; and that petitioner be granted such other and further relief as may be proper.

SAMUEL ROSE,
Petitioner,

By HAROLD W. HASTINGS,
SYDNEY A. HELLENBRAND,
His Counsel.

Dated: New York, N. Y., July 15, 1948.

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SAMUEL ROSE,

Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

Neither the Appellate Division, First Department, of the Supreme Court of the State of New York, nor the Court of Appeals of the State of New York rendered opinions in the determination of this case. The Appellate Division decision is reported in 271 App. Div. 926 and the Court of Appeals decision is reported in 297 N. Y. 786.

Jurisdiction

A statement as to jurisdiction appears in the petition on pages 11 to 13 inclusive.

Statement of the Case

A summary statement of the facts is given in the petition on pages 2 to 10 inclusive.

Statutes Involved

The statutes involved are set forth in an Appendix attached to this brief.

POINT I

The authority to remove an attorney from the Bar of the State of New York is purely statutory and not the outgrowth of the common law nor a part of the inherent powers of a court.

As far back as historical record permits of research, the power of the courts, both English and American, to remove and disbar attorneys appears to have been derived solely from Royal, Parliamentary or other Legislative grant.

In England, while there was a statute covering admission to practice as early as 1322, the first statute granting the courts power to disbar was in 1402 (4 Henry IV C 18). This provided in subdivision 5, as follows:

> "*The punishment of an attorney found in default.* If any such attorney be thereafter notoriously found in any default of records, or otherwise, he shall forswear the court and never after be received to make any suit in any court of the King."

Even as late as 1725 Parliament deemed the courts to have no power to disbar, except as already expressly conferred, because in that year it provided by statute (12 Geo. I.C. 29, sec. 4) for the removal of attorneys convicted of perjury and forgery, but who were still practicing in the courts, in the absence of specific prohibition against their so doing.

Much later, Parliament conferred expressly upon the Court of Divorce the power to punish attorneys guilty of

misconduct before it. (See 21 and 22 Vict., and the act amending that statute, sec 15).

In the State of New York the power of appointment and the power to regulate and discipline attorneys were, prior to the Revolution, exercised by the Governor of the Colony, and that power was derived by express grant from the King.

The power to admit attorneys in the State of New York is derived from Legislative grant, and in *Matter of Cooper,* 22 N. Y. 67, the Court said that the power of admission

> "* * * cannot be claimed as a part of the inherent power of the Courts or as resulting necessarily from their organization as Courts." (p. 90)

Even after the subject of admission was provided for by statute, reference to *Re Emmett,* 2 Caines' T. R. 386 (N. Y.) will indicate how strictly the New York Courts felt they were bound by the terms of such statutes. In that case, because the statute did not give power to the court to do so, the court deemed itself precluded from exacting an oath even of citizenship, and felt obliged to admit an alien as an attorney.

In *Matter of Cooper,* supra, the court in discussing the subject further said (p. 94):

> "The very next Legislature after the Constitution (of 1846) was adopted, in passing the Judiciary Act, assumed that the admission of attorneys and counsellors to practice, subject to the restrictions contained in the Constitution, was left, as before, in the hands of the Legislature; and its action in this respect has been uniformly acquiesced in by both bench

and bar. The Supreme Court itself has repeatedly ratified and confirmed this legislation, as it is by virtue of the judiciary act alone that it has exercised the power of admitting attorneys and counsellors to practice in other courts."

The Source of The Power of Removal In the State of New York

Just as the power of admission has been exercised by the courts of New York solely under authority of the Constitution and the various Judiciary Acts, so too their power of disbarment has been exercised under similar authority derived by grant from the Legislature, and only under such authority. (*Matter of Percy*, 36 N. Y. 650, 653).

The first enactment in New York authorizing the courts to remove attorneys and declaring the grounds therefor to be guilt of deceit, malpractice or misdemeanor, is contained in a statute of the New York Legislature of March 20, 1801.

The next New York statute on the subject of removal is contained in the Laws of New York, 36th Session (1813) Ch. 48, p. 416 (Rev. Laws of 1813, 1, 416) in which section 5 contains substantially the same provisions for removal as the older statute of 1801.

The Judiciary Act of 1847, referred to in *Matter of Cooper*, supra, was the successor of these earlier statutes, and became by reenactment and amendment sections 56 and 67 of the Code of Civil Procedure of New York, which themselves developed into the provisions of section 88 of the Judiciary Law as it existed on December 2, 1929.

In *Matter of Percy*, supra, the Court of Appeals discussed this source of power of removal and in concluding that the power was derived solely from specific legislative grant, to wit, from the then section 60 of the Judiciary Law of the State of New York (which incidentally set forth substantially the same grounds for removal as the later section 88), wrote (p. 653):

> "From the above statute the power of removal by the Court is derived."

Other authorities in New York to the effect that the power of the courts to remove an attorney is derived solely from legislative grant, are: *Matter of An Attorney*, 83 N. Y. 164 and *Matter of Droege*, 197 N. Y. 44.

In *Matter of An Attorney*, supra, the Court stated that:

> "the power of the court to admit and to remove attorneys is given by statute"

and because the court below had made an order in a disbarment proceeding permitting the examination of a witness outside the State, it held, that because there was no specific provision for such examination in the statute, that the order was beyond the power of the Supreme Court and that it constituted the exercise of a power by the Supreme Court "which the Legislature had not thought proper to bestow".

In *Matter of Droege*, supra, the court, while discussing its own power to review disbarments, said, concerning the power of the Appellate Division to disbar, that the legislature

> "has vested the Appellate Division of the Supreme Court with the power to admit applicants to practice, and to suspend or remove practitioners for *cause*".

Thus it will be seen how strict has been the construction of the power of the courts in relation to the removal of attorneys. Most of all, to warrant removal, there must be "cause", and that cause, and the different types of "cause" are enumerated in the Judiciary Law, which embodied section 88 at the time of this petitioner's disbarment. If it be thought by any that the provisions of section 88 give the Appellate Division any greater authority under the "power and control" clause of that section, we may see from the authorities that that clause, while it permits the Appellate Division to reach the guilty attorney by summary proceedings for punishment, it may act *only where there is involved a dereliction of duty.*

> *Matter of Forster,* 49 Hun. 114;
> *Willmont* v. *Meserole,* 16 Abb. Pr. N.S. 308;
> *People ex rel. Karlin* v. *Kulkin,* 248 N. Y. 464.

In December of 1929—the time of the making of the order of disbarment herein—the authority to remove an attorney was contained in section 88 of the Judiciary Law of New York, subdivision 2, which read in part as follows:

> "* * * and the Appellate Division of the Supreme Court in each department is authorized to censure, suspend from practice or remove from office by attorney or counsellor at law admitted to practice as such * * *.

In fact, the Association of the Bar of the City of New York, the only objectant to petitioner's motion to vacate

the disbarment, has conceded this to be the law. In a brief heretofore filed in the Appellate Division in 1934, at the time petitioner first applied to that Court for reinstatement on the basis of the findings made by Judge Knox in the Federal Court, the Bar Association wrote:

1. "In this State the power to admit and to *disbar* attorneys rests in the Legislature, and the courts only have such powers in relation thereto as are delegated by the Legislature."

2. "In Section 88, the Legislature has regulated the admission to and *removal* from practice by the Appellate Division."

3. "The Legislature has provided how an applicant shall be admitted to the office, *and how a person shall* be removed therefrom."

and most important, that

4. "It (the Legislature) has empowered the Appellate Division to discipline and remove attorneys *upon specified grounds.*"

Yet, in spite of these quoted provisions of the Judiciary Law of New York, in spite of the decisions and authorities referred to and cited herein, and in spite of its own admission and concession, all to the effect that in New York the power of the court to disbar is derived solely and only from statute, the Association of the Bar has contended, and we assume that it will again, that the power of a court to disbar upon a naked resignation not coupled with charges, findings or admissions of misconduct is "sanctioned by the established custom and usages of the courts". That argument is taken from *Ex Part*

Wall, 107 U. S. 265, where the following language appears:

> "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."

But, an examination of the *Wall* case discloses that all that case decided was that the attorney against whom charges had been filed and who had been disbarred for misconduct, was not entitled to a trial by jury on those charges; that the matter could be tried in a summary proceeding; that the court below had jurisdiction to entertain the proceeding of its own motion, without formal complaint having been presented to it, just so long as the attorney had received a reasonable opportunity to be heard in his own defense.

Accordingly, the court there held, under the particular circumstances of the *Wall* case, that the procedure of the court below was due process. But this is a far cry from asserting that this decision sanctions the disbarment of an attorney on a naked resignation—a resignation devoid of any charge, proof or admission of guilt of misconduct.

Among the other cases cited by the Association of the Bar in support of this principle are:

In re Clifton, 115 Fla. 168; *In re Silbley,* 151 Fla. 225; *In re Haddad,* 106 Vt. 322; *Ex Parte Thompson,* 32 Or. 499; *People* v. *Reed,* 341 Ill. 573; *Gresham* v. *Superior Court,* 44 Cal. App. (2d) 664; *Matter of Cashman,* 261 App. Div. 227; *Matter of Lyons,* 252 App. Div. 899; *In re Quartin,* 266 App. Div. 733.

In *People* v. *Reed, supra, In re Haddad, supra,* and in *Ex Parte Thompson, supra,* specific charges of miscon-

duct had been made and filed, notice thereof given to the attorney, answers made and hearings were pending or hearing dates fixed. At this point of those proceedings, each of the attorneys tried to resign. The courts did not in any of those cases accept the resignations offered under those circumstances but instead disbarred the attorney because of his refusal to defend himself against the charges filed. The courts in those cases interpreted the failure of the attorney to defend himself after charges were filed, hearings set and an opportunity to be heard granted, as "tacitly confessing the truth of the charges"—the language used by the court in *Ex Parte Thompson, supra.* Incidentally, in the *Thompson* case the resignation was refused even though an Oregon statute (1045-1046 Hill's Ann. Stat.) specifically permitted an attorney to resign. In New York there is not even such a permissive statute.

In both *In re Silbley, supra,* and *In re Clifton, supra,* the attorneys had filed a petition asking leave to resign from the bar. However, because charges were pending against them, the petitions for leave to resign were dismissed. The final outcome of the charges themselves in each of these cases is not indicated by the reports but was apparently left to await the trial of the charges of misconduct. But, most important, is that the resignations, tainted with charges of misconduct, were actually rejected by the court.

The case of *Gresham* v. *Superior Court, supra,* was not a disbarment proceeding. In that case the attorney had resigned from the Bar for reasons totally unconnected with his professional practice and conduct. The only question there involved was whether an attorney who had voluntarily resigned could bring action in his own name in spite of a

provision of a California statute prohibiting an attorney who had been disbarred or suspended from maintaining a suit based on a cause of action assigned to him. The decision necessarily turned on the interpretation of the act of resignation. The plaintiff was permitted to maintain that action because the court held that a resignation was not a disbarment and carried with it no inference of guilt.

In *Matter of Cashman*, 261 App. Div. 227, the professional conduct of respondent had been under investigation. After having been confronted with charges, the respondent filed an affidavit in which he stated:

> "I am tendering my consent and resignation for the reason that I have been under investigation • • • and in the event that disciplinary proceedings were instituted against me based upon certain transactions in which I have participated, I could not successfully defend the same."

In *Matter of Lyons*, 252 App. Div. 899, charges of misconduct were filed and served, and respondent served and filed his answer and thereafter resigned.

In re Quartin, 266 App. Div. 733, after charges had been filed and served, and during the pendency of disciplinary proceedings, the respondent resigned.

In each of these last three cases the resignations by the attorneys were tantamount to admissions of guilt, and the orders by the New York Appellate Division could, under the circumstances, be justified.

Summarizing the authorities offered by the Bar Association to sustain its claim that a disbarment, on a resignation

unaccompanied by charges, and proof, admission or confession thereof, or facts supplying any of these elements, "is sanctioned by the established customs and usages of the courts", it will be clearly seen that the citations are utterly inapplicable and that such a contention must fail of acceptance.

POINT II

The statutes dealing with disbarment require strict construction and strict compliance; all essentials and prerequisites must be present before an order of removal can be made.

Since the right to remove an attorney from office is a power dependent upon statute, such statute must be meticulously complied with and strictly construed. That is particularly so where the statute is penal in character as it is in the instant case. *Prussian* v. *United States,* 282 U. S. 675; *Speeter* v. *United States,* 42 Fed. (2d Series) 937.

In 1929 the New York statutes dealing with removal of an attorney were sections 88 and 476 of the Judiciary Law.

Section 88, subdivision 2, after reciting that the Appellate Division shall be authorized to suspend, censure or remove an attorney, provides that such authority may be exercised *only* where the attorney:

> "is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor or any conduct prejudicial to the administration of justice."

Obviously, an order of disbarment can be made only upon a finding or admission that the attorney is "guilty" of one of the acts of misconduct enumerated in this statute.

Nor may any mystery or ambiguity be attached to the word "guilty". "Guilty" has been defined by Bouvier in his Law Dictionary to be "a plea, by which one who is charged with a crime, misdemeanor or tort, admits or confesses it".

The record here discloses a total lack of any proof of guilt or facts indicating that any charges of misconduct were ever made against petitioner or that he ever admitted or confessed to any acts of misconduct.

The New York Legislature was careful to safeguard an attorney from removal upon any other basis or grounds and to assure protection to him enacted Section 476, which read:

> "Before an attorney or counsellor at law is suspended or removed as prescribed in Section 88 of this Chapter, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the presiding justice of the Appellate Division of the Supreme Court to which the charges have been presented, that he cannot be served within the State, the same may be served upon him without the State by mail or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense * * *".

The highest courts of the State of New York have repeatedly held that unless an attorney is guilty of the commission of an act prohibited by Section 88 of the Judiciary Law, he may not be disbarred or removed; and that the attorney prior to such removal must receive a copy of the charges against him and be allowed an opportunity to be heard in his defense.

Matter of Spencer, 137 App. Div. 330, aff'd 20 N. Y. 613;
Matter of Sidman, 268 App. Div. 1040;
Matter of Redmond, 267 App. Div. 780.

In the case at bar, compliance with the provisions of Section 476 is totally lacking, for it must be conceded that no charges against appellant were ever delivered or directed to be delivered to him nor was he ever given an opportunity to be heard in his defense.

The simple fact is that no charges existed, and no claim of misconduct was ever made.

Similiarly, it must be conceded that there never was nor could there ever have been a finding, conclusion or admission, as is required by Section 88, that appellant was "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."

The order of disbarment was based solely upon the affidavit and consent of November 29, 1929. As is plainly and clearly recited in the order of disbarment, it was made solely "upon reading and filing the annexed consent and affidavit". It was based on nothing more and there were no facts herein from which any inference of misconduct can be drawn.

The Act of Resigning From the Bar Carries With it no Inference of Misconduct.

In the case of *Gresham* v. *Superior Court,* 44 Cal. App. (2) 664, the court wrote:

> "There is a vast difference between disbarment, suspension, and resignation. To disbar means to deprive of the privilege of practicing law. To suspend means to withdraw temporarily the privilege of practicing law. It is to be noted that in both of the foregoing definitions the privilege of practicing law is taken away contrary to the desires and against the will of the attorney. To resign means to give up or surrender voluntarily the privilege of practicing law. This definition presupposes the voluntarily act and volition of the attorney in relinquishing his privilege, and does not connote any misconduct upon the part of the person resigning from the State Bar, it being presumed that he did so for reasons good and sufficient to him and not because of any misconduct on his part."

Furthermore, the statement in the resettled order of the Appellate Division, dated January 24, 1947, that the court in reaching its determination considered and had before it a copy of a "report and presentment filed February 27, 1929, in the United States District Court, Southern District of New York," cannot constitute a basis for the inference that petitioner was guilty of any misconduct, or resigned because of any consciousness of guilt.

In the present inquisition as to whether the said Appellate Division acted properly and legally in the making of the order of disbarment dated December 2, 1929, we must consider and examine only those papers and documents which were before the court at that time.

It is not and it will not be denied that this grand jury presentment was not on file or submitted to said Appellate Division on December 2, 1929 or at any time prior thereto. A copy of such presentment, which will now be found in the files of that court, reflects upon the face thereof that it was submitted and filed with that court on November 15, 1946—seventeen years after the entry and the making of the order of disbarment. By no legal argument or mental gymnastics can that Grand Jury presentment constitute the making or filing of charges or an admission or confession of misconduct, required by the state statutes, in order to lend validity to the order of disbarment of December 2, 1929.

Of utmost importance, is the fact that the report and presentment does not mention petitioner's name; it does not in any manner refer to petitioner's personal or professional conduct; and there is no proof, or even a claim, that petitioner ever saw it or knew of its existence at the time or prior to his resignation.

Since it is obvious that this report and presentment was not and could not possibly have been considered by the court at the time of the making of the order of disbarment, it must follow that it ought now be totally disregarded in the present consideration of the merits of this case.

A clear indication of the total failure of the report and presentment to supply any of the factual elements of proof required to justify even an inference of consciousness of guilt is found in the circumstance that when this case reached the Court of Appeals in January of 1948, on the occasion of the appeal sought to be taken as of right to that court from the denial by the Appellate Division of the motion to vacate the order of disbarment, the Bar Associa-

tion completely abandoned any pretense that the report and presentment possessed any factual or evidentiary value whatever, for the Bar Association did not even dignify this document any longer by so much as a mention thereof, either in its brief or in the oral argument before the court.

Where a Statute Gives a Court the Power to Act in a Given Instance, the Court May Not Exercise that Power in a Case to Which the Statute Has No Application.

It is a cardinal rule of law that where the Legislature has delegated to a court the power to enter a judgment or order upon certain specified grounds, the court may not exercise such power upon grounds other than those specified, and if it does, its judgments and orders will and must be regarded as a nullity.

This principle of law is well illustrated in *Davidson* v. *Ream,* 178 App. Div. 362. In that case, plaintiff sought, and at her request was granted, a judgment annulling her marriage to the defendant. Some time later plaintiff moved to vacate and to set aside that judgment. The court first concluded that:

> "There is no general equitable jurisdiction to set aside marriages; the power to deal with matrimonial actions must be found in the statutes (*Stokes* v. *Stokes,* 198 N. Y. 301, 304; *Walter* v. *Walter,* 217 id. 439)."

Upon an examination of the original complaint in the annulment action, it became obvious that the facts therein alleged were insufficient to state a cause of action as was re-

quired by the statutes dealing with annulment actions. As was said by the court:

> "Section 1742 of the Code of Civil Procedure permits of an action by a woman married under the age of sixteen years, and section 1743 provides for an action to procure a judgment declaring a marriage contract void and annulling the marriage for certain specified causes, *but among these are none covered by the pleadings in the original action, and the express mention of these specified causes of course operates to exclude all others.*" (Italics ours)

The court then concluded that the order vacating the decree of annulment was proper and wrote:

> "The rule is established that 'a court authorized to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and the judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. (*O'Donoghue* v. *Boies*, 159 N. Y. 87, 89 and authorities there cited.' This is exactly the situation presented here; the cause of action attempted to be asserted is not one of those which are enumerated in the Code of Civil Procedure, and the plaintiff in that action might, if she chose, proceed exactly as though no judgment had in form been entered. She has chosen to proceed directly by motion in the action, and no matter what her conduct may have been, *she is entitled to the order of this court, not because of any equitable consideration for her, but because the judgment does not rest upon jurisdictional facts—because she has not been deprived of her marital rights by due process of law.*" (Italics ours.)

Applied to the case at bar, we find that the order of disbarment of December 2, 1929, was entered upon a ground not enumerated in the then section 88 of the Judiciary Law. That section did not grant to the court the power to make an order of disbarment upon a naked resignation unaccompanied by a finding of guilt of misconduct or an admission or a confession of misconduct. That order is, therefore, a nullity and should be so treated, not because of any equitable consideration for petitioner, but because he was deprived, without due process of law, of his right to continue to practice law and to follow his chosen profession.

POINT III

The order of December 2, 1929, entered against petitioner is one of disbarment and removal.

The contention may be advanced that the order of December 2, 1929 is not one of disbarment or removal but simply one accepting petitioner's "voluntary" resignation. That argument is quickly disposed of when we lay side by side the language of Section 88 of the Judiciary law and the language of the order.

That statute provides that in every order of removal the Appellate Division shall insert the provision which shall:

The Statute	*The Order*
"* * * command the attorney and counsellor at law thereafter to desist and refrain from the practice of law in any form either as principal or as agent, clerk or employee of another".	"* * * Samuel Rose be and he hereby is commanded to desist and refrain from the practice of law in any form, either as principal or agent or clerk or employee of another * * *".

The Statute	*The Order*
"In addition it shall forbid * * * the appearance of an attorney or counsellor at law before any court, Judge, Justice, Board, Commission or other public authority".	"* * * Samuel Rose be and he hereby is forbidden * * * to appear as an attorney and counsellor at law before any court, Judge, Justice, Board, Commission or other public authority * * *".
"The giving to another of an opinion as to the law or its application or of any advice in relation thereto."	"* * * Samuel Rose be and he hereby is forbidden to give to another an opinion as to the law or its application or advice with relation thereto * * *".

Certainly, the order entered against petitioner is not one accepting his resignation and ordering it on file. It is an order removing and disbarring him—the type of an order permitted by Legislative enactment only in a case where the attorney is guilty of misconduct.

Nor do we believe that the Association of the Bar will urge to the contrary because as early as 1934, in its brief opposing petitioner's first application for reinstatement, the Association of the Bar wrote that "petitioner was removed from office".

POINT IV

Petitioner's consent to the entry of the order of disbarment is of no moment.

Disregarding for the moment the conclusive findings of Judge Knox regarding petitioner's mental and physical condition at the time he executed the consent to an order removing him from the Bar, we find that as a matter of law such consent does not preclude petitioner from now attacking that order.

Since the court was not authorized by the statute to exercise its powers upon the state of facts which existed at the time that it made that order, petitioner's consent could not possibly have supplied the power which the statute and the Legislature never intended to give to the court.

In *Davidsburgh* v. *Knickerbocker Life Insurance Co.*, 90 N. Y. 526, this Court held:

> "There are, no doubt, many cases where the court having jurisdiction over the subject matter may proceed against a defendant who voluntarily submits to its decision but where the statute prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

A similar situation was presented in the case of *Davidson* v. *Ream, supra,* where the plaintiff, who had formerly sought, consented to and obtained a judgment of annulment of her marriage, later sought to vacate that judgment obtained by her. The court in brushing aside the

contention that the plaintiff was precluded from seeking to vacate that judgment because she had at one time consented to its entry, wrote:

> "* * * the fact that the plaintiff was, in form at least, the moving party in the original action, does not estop her from invoking the aid of this court. Wherever there is want of authority to hear and determine the subject matter of the controversy an adjudication upon the merits is a nullity and does not estop even an assenting party. (*Matter of Walker*, 139 N. Y. 20, 29, and authority there cited; *Risley* v. *Phenix Bank of City of New York*, 83 id. 318; 337; *O'Donoughue* v. *Boies*, 159 id. 87, 98, 99 and authorities cited.)"

POINT V

The right to practice law, once licensed, is a property right; the continued prosecution of that profession can be taken away only by due process of law.

While there may exist differences among the authorities in this country as to whether the expressed desire or wish to be licensed to practice a profession is a privilege or a right, they are all in unanimous agreement that where one has been duly licensed to practice a profession he acquires a right and "estate" to continue in the prosecution of that profession. That right which is thus acquired can be taken away only by due process of law.

In *Dent* v. *West Virginia*, 129 U. S. 114, the court enunciated this principle of law in the following manner:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business

> or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken."

Similarly, the court held in *In re Applications for Admission to Practice,* 14 S. D. 429, 85 N. W. Rep. 992:

> "The right to practice law is a vested right of which one can be deprived of only upon good cause shown and proper judicial proceedings."

To the same effect is *Ex parte A. H. Garland,* 18 U. S. L. Ed. 336, where the court wrote:

> "The attorney and counsellor, being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency."

Authorities to the same effect dealing with the profession of dentistry and optometry are:

Kentucky State Board of Dental Examiners v. *Crowell*, 294 S. W. Rep. 818;
Matthews v. *Murphy*, 635 S. W. 785, 23 Ky. L. Rep. 750;
Harris v. *State Board*, 135 Atl. Rep. 237.

POINT VI

The prior contentions of the Association of the Bar of the City of New York.

The Association of the Bar will in all probability attempt to defeat the granting of this writ by the contentions that (a) a constitutional question and the construction of the constitution were not involved; (b) that the entire matter is *res adjudicata;* and that (c) the Appellate Division decision denying petitioner's application to vacate the order of disbarment "may well have been based" upon grounds other than the issue of due process of law.

These contentions were advanced by the Bar Association in the state courts; they were obviously disregarded and we submit that they ought now again be disregarded because they are without merit.

a. Is there involved here a constitutional question and the construction of the constitution.

In the Appellate Division, the court of original jurisdiction, petitioner urged, and the papers on appeal so disclose, that the making of the order of disbarment was

without due process of law and in violation of his constitutional rights because of the failure to comply with the applicable state statutes. The notice of motion there sought relief on the sole ground that the Appellate Division lacked the power to enter the order of disbarment against the petitioner, and that by reason of such lack of power, his constitutional rights had been violated, and that he had been deprived, without due process of law, of his right to practice. That ground is embellished in the affidavit submitted on the motion in the court below wherein he stated (fol. 60):

> "The present application is made on the ground that this court had no power, under Section 88 of the Judiciary Law, to enter the said order striking my name from the roll of attorneys of the State of New York and that the said order of disbarment was violative of my constitutional rights and the due process clause of the Fourteenth Amendment of the Constitution of the United States of America."

This alone compels the invoking of the elementary rule of law that where a judgment or order is attacked upon the ground that there was a failure of due process of law, a constitutional question and the construction of the constitution are necessarily and directly involved.

> *Waddey* v. *Waddey*, 290 N. Y. 251;
> *Valz* v. *Sheepshead Bay Bungalow Corp.*, 249 N. Y. 122.

As was stated by the court in *Valz* v. *Sheepshead Bay Bungalow Corp., supra*:

> "The sole question presented to the courts in the instant case is whether the judgment of foreclosure is

based upon due process of law. *That question involves directly and necessarily the construction of the constitution.*

b. *Res Adjudicata.*

As has heretofore been pointed out, petitioner, in 1933, made an application addressed to the discretion of the said Appellate Division seeking reinstatement to the Bar. That application did not mention or even infer any claim or contention of a violation of petitioner's constitutional rights or the absence of due process of law in the making of the order of disbarment against him. That application was denied by the Appellate Division in 1935 and thereafter the State Court of Appeals, having granted permission to appeal, the matter was heard and submitted to that court.

In the petitioner's brief then filed with the Court of Appeals it was urged *for the first time,* and among many other things, that the Appellate Division lacked jurisdiction to make the order of disbarment herein.

We submit that such contention raised *for the first time* on appeal to the Court of Appeals, cannot and does not constitute *res adjudicata* for at least two reasons.

First, the contention that the Appellate Division lacked authority to make the order of disbarment cannot, by the farthest stretch of the imagination, be deemed to raise the questions of petitioner's constitutional rights and the due process clause of the constitution, and

Second, we find the law to be universally in accord that where a constitutional question is sought to be raised and presented *for the first time* upon an appeal, it not having been raised in the court of original jurisdiction, that ques-

tion will not be considered nor passed upon by the court hearing the appeal.

Mutual Life v. *McGrew,* 188 U. S. 291;
Zadig v. *Baldwin,* 166 U. S. 485;
Sayward v. *Denny,* 158 U. S. 180;
Maloney v. *Hearst Hotels Corp.,* 274 N. Y. 106;
Dobrikin v. *Union Railway Co. of New York City,* 250 N. Y. 561;
Peo. ex rel. Rutland R.R. Co. v. *State Tax Commission,* 243 N. Y. 543;
Nicholson v. *Greeley Square Hotel Corp.,* 227 N. Y. 345;
People v. *Bresler,* 218 N. Y. 567;
Camponigri v. *Altieri,* 166 N. Y. 255.

Since the application of 1933 did not present to, nor call upon the court of original jurisdiction, the Appellate Division, to consider or pass upon the question of the violation of petitioner's constitutional rights or the issue of due process of law, the subsequent action by the Court of Appeals is merely an approval of the decision of the court below upon the papers submitted to the court below.

It therefore follows that the constitutional question now raised was not heretofore passed upon and that the contention of *res adjudicata* is entirely without merit.

c. Was the Appellate Division order of January 24, 1947, denying the vacatur of the disbarment order based upon grounds other than the issue of due process of law.

The Association of the Bar has heretofore urged that the Appellate Division decision denying petitioner's application to vacate the disbarment order "may well have been based" upon grounds other than those advanced by petitioner in his application.

Such an argument asks this Court to do nothing more than to engage in a guessing contest. Certainly, that will not be done in this case—a case where the very future of a man, his right to earn a livelihood, his right to continue as a member of a noble profession to which he was once admitted, are involved.

Further, such a contention has no factual basis because the contrary is true.

The notice of motion to vacate the disbarment order in the court of original jurisdiction sought relief upon the ground "that the said Appellate Division had no power to enter said order of disbarment" (fol. 51). This contention was embellished in petitioner's affidavit then submitted when he urged that the entry of the disbarment order was "violative of my constitutional rights and the due process clause of the Fourteenth Amendment of the Constitution of the United States of America" (fol. 41). That motion was denied by the Appellate Division without opinion and merely recited that the motion was denied. Not a word in that order that the basis for the decision was *res adjudicata* or laches as the Bar Association now suggests.

Thereafter the Association of the Bar moved to resettle that order and in the affidavit in support thereof the Association of the Bar admitted that petitioner had applied for an order to vacate and set aside the disbarment order "on the ground that the entry of such last mentioned order was violative of his constitutional rights and in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States of America. It thus appears that petitioner purports to assert a question of constitutionality under the constitution of the United States of America as to which a further appeal to the Supreme Court of the United States may lie" (fols. 34, 35).

Petitioner submitted an affidavit in opposition to the motion to resettle the order in which he urged that "the sole question in this matter now is whether this Court had the power and jurisdiction to enter the order of December 2, 1929, and whether the entry of such order violated deponent's constitutional rights and none other" (fol. 45).

With all these facts, statements and papers before the Appellate Division, that Court, on January 24, 1947, entered its order and merely wrote that petitioner having applied for an order vacating and setting aside the disbarment order of December 2, 1929 striking his name from the roll of attorneys admitted to practice to the Bar of the State of New York "It is hereby unanimously ordered that said motion be and the same is hereby denied" (fol. 21).

Merely because the Association of the Bar contended in the Appellate Division that the motion to vacate the disbarment order should be denied because of *res adjudicata*

or any ground other than the single constitutional question raised by petitioner, it does not follow that any of these other grounds formed the basis for the decision by the Appellate Division.

As was stated in *Valz* v. *Sheepshead Bay Bungalow Corp.* 249 N. Y. 122,

> "It is also urged that the construction of the constitution is not directly or necessarily involved in this appeal, because the decision of the courts below *might* be based upon a finding of estoppel or laches. The answer to that contention is that the courts below did not * * * find estoppel or laches".

Certainly, were it the fact that the Appellate Division denied petitioner's application to vacate the disbarment order upon any ground other than its interpretation of the constitutional question involved, the only ground upon which petitioner's motion was based, it would have so stated affirmatively and in no uncertain terms.

The several cases decided by this Court and heretofore relied upon by the Association are not in point. In each of these cases (*Whitney* v. *California*, 274 U. S. 357; *Mellon* v. *O'Neil*, 275 U. S. 212; *Wood* v. *Chesborough*, 228 U. S. 672; *Preston* v. *The City of Chicago*, 226 U. S. 447 and *Empire State—Idaho Mining Co.* v. *Hanley*, 205 U. S. 225) this Court dismissed the appeals because either there was nothing in the record of the court below to show that a constitutional question was involved or because the record in the court below specifically disclosed that the lower court's decision was affirmatively based upon some ground other than a constitutional question.

Conclusion

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

HAROLD W. HASTINGS,
SYDNEY A. HELLENBRAND,
Counsel for Petitioner.

Dated: New York, July 15, 1948.

APPENDIX

The Statutes Involved

Section 88 of the New York Judiciary Law.

"Section 88 Admission to and removal from practice by appellate division.

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

Section 476 of the New York Judiciary Law.

"Section 476 Suspension of attorney from practice must be on notice.

Before an attorney or counsellor at law is suspended or removed as prescribed in section 88 of this chapter, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot be served within the state, the same may be served

upon him without the state by mail or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense * * *."

Section 588 of the New York Civil Practice Act.

"Section 588. Appeal as of right. Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States."

Section 589 of the New York Civil Practice Act.

"Section 589 Appeal by Permission.

Appeal to the court of appeals by permission lies only

1. By permission of the appellate division and not otherwise,

(a) from a judgment or order of the appellate division which does not finally determine the action or special proceeding in which it is entered, and

2(a). by permission of the appellate division granted before application to the court of appeals for permission to appeal, and in case of refusal of such permission by permission of the court of appeals.

3(a). The appeals authorized by this section shall be allowed upon questions of law when required in the interest of substantial justice; and the appel-

late division, when it allows such an appeal, shall certify that questions of law have arisen which in its opinion ought to be reviewed by the court of appeals.

(b) In its order allowing an appeal from a judgment or order which does not finally determine an action or special proceeding, the appellate division shall certify the questions of law decisive of the correctness of its determination or of any separable portion thereof; and the determination shall then be reviewable in the court of appeals in the manner prescribed in sections six hundred and three and six hundred and six of this act. The court of appeals shall certify to the appellate division its answers to the questions certified and shall direct the entry of the appropriate order or judgment."

Section 592 of the New York Civil Practice Act.

"Section 592 Limitations of time; procedure to obtain permission to appeal.

2. An application in the appellate division for permission to appeal to the court of appeals from a judgment or order of the appellate division, or of the court of original instance, must be returnable at the term of the appellate division during which a copy of the judgment or order sought to be appealed from with notice of entry thereof was served, or at the next succeeding term.

3. An application to the court of appeals for permission to appeal must be made by serving and filing all required papers within thirty days after service of a copy of the order of the appellate division denying permission to appeal, with notice of entry thereof, or, if the application be made directly to the court of appeals, within thirty days after service of

a copy of the judgment or order sought to be appealed from, with notice of entry thereof, and the application will then be deemed returnable at the next motion day in the court of appeals occurring more than four days after such service and filing.

5. Notwithstanding any of the foregoing limitations, * * *

(b) An application for permission to appeal may be made following dismissal of an appeal taken as a right provided that the court is otherwise authorized to grant permission to appeal and the proceedings have not been improperly delayed

(1) By applying to the appellate division at the term of that court during which the order of the court of appeals dismissing the appeal was entered or at the next succeeding term and then, in case of refusal, by applying to the court of appeals within the time ordered by subdivision 3 of this section. * * *."